IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 41 ORIGINAL

STATE OF OHIO, EX REL., PAUL W. BROWN, Attorney General of Ohio, State House Annex, Columbus, Ohio 43215, *Plaintiff*,

v.

WYANDOTTE CHEMICALS CORPORATION, a corporation existing under the laws of Michigan, located at 1609 Biddle Avenue, Wyandotte, Michigan,

and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, a corporation existing under the laws of the Dominion of Canada, located at Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, a corporation existing under the laws of Delaware, located at Midland, Michigan, *Defendants*.

BRIEF OF DOW CHEMICAL OF CANADA, LIMITED IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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BRIEF OF DOW CHEMICAL OF CANADA, LIMITED IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT [1]

JURISDICTION

1. The State of Ohio applies for leave to file a complaint claiming relief in two separate and distinct capacities:

(1) on its own behalf as *parens patriae*, and

(2) as Trustee for and on behalf of the citizens and inhabitants of Ohio.

2. On its own behalf it claims in its prayer for injunctive relief restraining among others the defend-

[1] This is the correct corporate name of the defendant wrongly styled Dow Chemical Company of Canada, Limited.

ant, Dow Chemical of Canada, Limited, from committing a public nuisance, and further injunctive relief restraining the same defendant from introducing mercury and mercury compounds into Lake Erie or any tributary thereto.

3. In its capacity as Trustee and owner in trust it claims a mandatory injunction or damages in lieu thereof requiring the removal of the poisonous mercury and mercury compounds from Lake Erie and any tributaries thereto "if that is found to be feasible" or alternatively a decree for damages "*to be held in trust* and expended only for this purpose".

4. Further in its capacity as Trustee there is a prayer for a decree for damages "compensating for the existing and future damages to Lake Erie, the fish and other wildlife, the vegetation and the citizens and inhabitants of Ohio."

5. The action is brought against two corporations physically situate and carrying on business in the State of Michigan, another one of the States of the United States of America. Also named as a defendant is Dow Chemical of Canada, Limited, a corporation incorporated under the laws of the Dominion of Canada and resident within the Province of Ontario, one of the provinces of the Dominion of Canada.

6. The plaintiff seeks to invoke the jurisdiction of this Court by reliance upon Article III, Section 2, Clause 2 of the Constitution of the United States which reads in part as follows:

> "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction."

and also Section 1251 of Title 28 of the United States Code which reads in part as follows:

> "B—The Supreme Court shall have original but not exclusive jurisdiction of: . . . (3) all actions or proceedings by a State against the citizens of another State or against aliens."

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES

1. Article III, Section 2, Clauses 1 and 2 of the Constitution of the United States. See Appendix I.

2. Part B(3) of Section 1251 of Title 28 of the United States Code. See Appendix II.

3. Boundary Waters Treaty of 1909 between the Government of the United States and the Government of Great Britain (on behalf of Canada). See Appendix III.

APPENDICES

APPENDIX III—Constitutional provision, treaties and statutes.

APPENDIX IV—Map of Lake Erie and Lake Ontario drainage basins.

APPENDIX V—Letter from John P. Robarts, Prime Minister of Ontario, to City Clerk, City of Sarnia, dated May 15th, 1970.

APPENDIX VI—Order of the Ontario Water Resources Commission dated March 26, 1970.

APPENDIX VII—Letter from O.W.R.C. to Dow Chemical of Canada Limited, dated May 13, 1970.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is there original jurisdiction in the Supreme Court of the United States with respect to a claim against an alien which is not subject to the *in personam* jurisdiction of the Supreme Court of the United States where that claim arises out of conduct by that alien in another country?

2. Is there original jurisdiction in the Supreme Court of the United States with respect to that portion of the prayer for relief relating to a money decree for damages where that relief is not sought on behalf of the State of Ohio itself but instead in the name of the State of Ohio in its capacity as Trustee of and for the citizens and inhabitants of the State of Ohio?

3. Will the Supreme Court of the United States assume jurisdiction in an action founded on an alleged nuisance where, so far as this defendant, Dow Chemical of Canada, Limited is concerned, the alleged nuisance was abated at the direction of and subject to the continuing jurisdiction of the Crown in right of the Province of Ontario prior to the institution of these proceedings for leave to file a complaint?

4. Will the Supreme Court of the United States assume jurisdiction in a matter where it is doubtful whether it can enforce its judgment or compel compliance with its orders and in particular where in this case extra-territorial injunctive relief is sought against a Canadian corporation?

5. Will the Supreme Court of the United States assume jurisdiction where the relief requested of the court is a relief which is incapable of enforcement by reason of its lacking in certainty because it requires

the court to embark upon speculative assessments of damages and to create trusts which are themselves incapable of certainty:

(i) as to vesting;

(ii) as to class;

(iii) as to events?

6. Does the 1909 (Boundary Waters) Treaty between the United States of America and Great Britain (on behalf of Canada) provide the proper mechanism for investigating and, if necessary, adjudicating upon controversies involving pollution of the Great Lakes?

7. Should the Supreme Court of the United States assume jurisdiction in a case involving delicate international questions of political sensitivity and complex questions of fact where the two Sovereign Governments concerned have established and empowered a specialized agency to investigate and adjudicate precisely such problems pursuant to Articles IX and X of the 1909 Boundary Waters Treaty?

8. Does any entity other than the Government of the United States have the right in International Law to enforce an International Treaty entered into by the Government of the United States?

STATEMENT OF THE CASE

1. There is no suggestion either in the proposed complaint or in the material filed that the State of Ohio asserts any proprietary right other than as Trustee for the citizens and inhabitants of the State of Ohio.

2. Any injury which may have been suffered by the plaintiff either in its capacity as a quasi-sovereign or

as Trustee for its citizens and inhabitants must in similar capacity have been sustained by the following states:[1]

(i) the State of New York;
(ii) the State of Pennsylvania;
(iii) the State of Michigan;
(iv) the Province of Ontario;
(v) the United States of America in its Sovereign Capacity;
(vi) the Dominion of Canada in its Sovereign Capacity.

3. Not until the early months of 1970 did it become known in North America that metallic mercury, previously believed to be harmless to living things when immersed in water, could perhaps be very slowly converted by certain types of micro-organisms (in an environment where these micro-organisms were present) into a potentially dangerous compound, methyl mercury.[2] It was further discovered at or about the same time that fish taken from the St. Clair River and taken from Lake Erie contained within their flesh values of methyl mercury suspected of being significant.

4. Dow Chemical of Canada, Limited, has not at any time, nor has any one ever suggested that it has at any time, introduced methyl mercury into the waters of the St. Clair River. The only forms of mercury asserted to have been introduced into the St. Clair River have been metallic or inorganic forms of mercury here-

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[1] See Appendix IV—Map of St. Clair River—Lake Erie and environs.

[2] See Appendix V.

tofore regarded by all persons and Governments as being harmless when immersed in water.

5. In February 1970, the Ontario Water Resources Commission advised Dow Chemical of Canada, Limited that it must "take immediate steps to eliminate any discharge of mercury from its establishment to the water environment." This informal advice was followed by a written order issued March 26, 1970[3] requiring Dow Chemical of Canada, Limited to install on or before April 15, 1970 facilities which would assure that no mercury would escape to the environment, to keep such facilities in repair and operate them as directed by the Commission, and to sample, analyze and report to the Commission twice a month concerning liquid effluent discharge from its plant.

6. Dow Chemical of Canada, Limited already had a programme for eliminating mercury losses under way by February of 1970. At the Commission's request this programme was speeded up and completed on a crash basis on March 27, 1970 by taking extreme measures, including literally cementing shut the sewer openings at the Sarnia mercury-cell plants and shutting down a caustic concentrating plant. As explained by the Manager of Environmental Quality Control for Dow Chemical of Canada, Limited to a Standing Committee of the Ontario Legislature inquiring into the Ontario Water Resources Commission:

> "On February 4, 1970, O.W.R.C. provided the Company with mercury analyses of the fish and asked the Company for additional information on the escape of mercury from the plant and for a speed-up of the programme which we had underway for reducing our mercury losses. As a result

[3] See Appendix VI.

of that request we immediately implemented a crash programme to eliminate the mercury losses and subsequently, about March 24, we learned of the proposed fishing ban by the Minister of Fisheries. Because of the advanced stage of our activity to prevent all escape of mercury to the river, we were able to make a number of temporary installations of additional lines and equipment and completely seal off the plant within 3 days. Subsequent to that date the temporary installations were progressively replaced by the intended permanent facilities and the plant is now permanently sealed off from escape of mercury to the river."

7. Since that time the Ontario Water Resources Commission has advised Dow Chemical of Canada, Limited both orally and in writing, that the Commission is satisfied with the remedial steps taken by Dow Chemical of Canada, Limited and regards Dow Chemical of Canada, Limited as being in compliance with the Commission's order. On May 13, 1970, the Director of the Commission's Division of Industrial Wastes wrote the manager of Dow Chemical of Canada, Limited's Sarnia plant as follows:

"This is to advise you that compliance with Sections I and II of this order has been executed by your Company. Section III of the order, referring to the maintenance of treatment facilities in a good state of repair and operating condition, will of course remain in effect.

With regard to the frequency of reporting under Section I of the order, it is our view that such reports should now be submitted on a monthly basis commencing June 1st, 1970. This could be included in your regular monthly analyses report."[4]

[4] See Appendix VII.

8. Intensive investigations since February 1970, by governmental agencies of Federal, State, Dominion and Provincial Authorities, and also by private industry have failed to show whether or not there is or has been any movement of mercury or mercury compounds from the St. Clair River into Lake Erie, or whether or not there is or has been any movement of mercury or mercury compounds across the boundary between Canada and the United States.

> "It is not possible to conclude reasonably that specific wastes originating on the Ontario side are transmitted to any given location on the American side in any concentration sufficient to cause an injury which would not be caused by the same or similar wastes originating on the American side, for the following reasons:
>
> (1) the large volume of water involved;
>
> (2) the distance between any alleged source of waste on the Ontario side and a given location of injury on the American side;
>
> (3) the many variable factors affecting the movement of wastes in these waters or in their sediments;
>
> (4) the numerous sources of the same or similar wastes originating on both sides of the boundary;
>
> (5) the varying rates of biochemical breakdown of different wastes; and
>
> (6) the varying rates of re-aeration of these waters."[5]

9. Similarly these investigations have been wholly unable to produce any correlation of the results ob-

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[5] Henry Landis, *Legal Controls of Pollution in the Great Lakes Basin*, 48 Canadian Bar Review 66, 131 (1970).

tained from sedimentary and/or fish sampling with any other data. Acute problems exist in the testing and sampling procedures not the least of which are the present technical limitations of testing techniques to detect concentrations of less than .0002 parts per million total mercury.

10. The same investigations have been unable to demonstrate or produce any data one way or the other as would suggest that micro-organisms capable of converting metallic mercury into methyl mercury are present in the waters or sediments in question.

11. It has been established to date that mercury is naturally occurring in the sediments of Lake Erie in quantities in the order of .02 parts per million. It has further been established that there are other major sources of the mercury found to be present in Lake Erie besides that which may have been contributed by these defendants. "There are a wide variety of uses of mercury and mercury compounds and it would just not be possible to provide a complete list." (See Appendix V)

12. Modern science and technology are not capable to date of determining whether or not there exists any possible way of completely removing mercury and its compounds from the waters of either the St. Clair River or Lake Erie. At this moment in time the Province of Ontario is proposing to dredge part of the St. Clair River, while at the same time there is grave concern, based on Swedish research, as to whether or not dredging is the proper method and still further whether dredging will aggravate rather than ameliorate the conditions. Whether or not dredging will succeed in removing the mercury and its compounds is also a matter of great uncertainty.

13. There is no known incident of any injury having been suffered by human beings, wildlife, (including fish), or vegetation resulting from the presence of mercury in either the St. Clair River, Lake St. Clair, the Detroit River or Lake Erie. There is evidence of unexpected methyl mercury values being present in the flesh of fish, but testing of humans to date has not demonstrated abnormal levels in human beings. Nobody knows whether or not, from time immemorial, fish in Lake Erie have had methyl mercury present in their flesh.

14. It has been conceded by all responsible governmental agencies and authorities that the circumstances of this case, so far as this defendant, Dow Chemical of Canada, Limited, is concerned are entirely different from the circumstances of the Minamata Bay tragedy (referred to by the State of Ohio in its Brief at page 14).

15. In the Minamata case the effluent of a vinyl chloride plant containing methyl mercury at that time known to be toxic to humans was discharged directly on shellfish beds from which the local population was known to derive the bulk of its diet.[6] It is again emphasized that Dow Chemical of Canada, Limited, has never discharged methyl mercury.

16. Dow Chemical of Canada, Limited does not carry on business in the United States of America. Sales of products manufactured by Dow Chemical of Canada, Limited to customers resident in the United States do not constitute more than a minute percentage of the total annual sales volume of Dow Chemical of Canada, Limited.

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[6] P.L. Bidstrup, Toxicity of Mercury and its Compounds p. 77.

17. Dow Chemical of Canada, Limited does not have and never has had:

(i) an office or plant in the United States;

(ii) an authorized agent or distributor in the United States;

(iii) any advertisements in the United States;

(iv) a telephone listing in any city telephone directory of any American city or town;

(v) real estate in the United States owned or leased by it;

(vi) any servants or authorized agents engaged in soliciting sales in the United States from Canada, by mail or telephone;

(vii) a licence to carry on business in the United States (nor has it ever applied for such a licence);

(viii) goods stored or warehoused in the United States.

18. Dow Chemical of Canada, Limited conducts its business from sales offices in six Canadian cities, and it maintains manufacturing plants at ten different Canadian locations.

19. The relationship of Dow Chemical of Canada, Limited and The Dow Chemical Company is merely that of a Company and its stockholder. Dow Chemical of Canada, Limited is a completely autonomous, totally independent, operating company which derives its legal existence from and is responsible to the Government of the Dominion of Canada.

20. The operational independence of Dow Chemical of Canada, Limited from The Dow Chemical Company

is indicated by the fact that Dow Chemical of Canada, Limited maintains:

(a) export operations to Europe and elsewhere in competition with other corporations bearing the "Dow" name;

(b) independent employment practices and payrolls;

(c) separate meetings of its corporate board;

(d) independent research activities;

(e) independent financing of its operations;

(f) independent marketing and production practices and freedom at a policy level.

21. In 1909 the sovereign powers, United States of America and Government of the United Kingdom of Great Britain (acting on behalf of Canada), entered into a treaty commonly referred to as the Boundary Waters Treaty.

22. The 1909 Treaty contains a substantive agreement in Article IV thereof that boundary waters including, by definition, Lake Erie, Lake St. Clair, the St. Clair River and the Detroit River "shall not be polluted on either side to the injury of health or property on the other". The same Treaty in Article IX thereof provides that:

"matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time

to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred".

23. As far back as 1915 full scale hearings were held by the Commission with respect to the pollution of the Great Lakes.

24. With the expansion of industrialization on both sides of the international border between Canada and the United States, and the consequent augmentation of the pollution problem, the Commission conducted further investigations and in 1950 made an extensive report on the then state of Great Lakes water pollution.

25. The nature of the Commission's activity in this sphere in the last quarter century can be appreciated by consideration of the following extracts from a paper presented to the 1967 Washington International Conference on Water for Peace under the joint names of Matthew E. Welsh and A.D.P. Heeney, the Chairmen of the American and Canadian Sections of the International Joint Commission:

"In 1950, following an extensive investigation, the Commission reported that these boundary waters [the Great Lakes including Lake St. Clair and the Detroit and Niagara Rivers] were being polluted on each side of the boundary to the injury of health and property on the other side. In consequence, it recommended that certain stated 'Objectives for Boundary Waters Quality Control' be adopted by the Governments as the criteria to be met in maintaining these waters in a satisfactory condition as contemplated in the 1909

Treaty. It also recommended that the remedial measures necessary to meet the 'Objectives' be put into effect and that the Commission be authorized to establish and maintain continuing supervision over the quality of these waters. The Governments approved all of these recommendations. As a result, since that time the Commission has kept itself informed of developments in the area, and where the approved 'Objectives' are not being met or satisfactory assurances are not received that they will be met in a reasonable time, the Commission has taken up the matter with the appropriate authority having local jurisdiction.

There has been the closest co-operation between the Commission and the local pollution control authorities in each country. The results have been encouraging, especially when one considers the extensive industrial development that has occurred in the area during the same period. Substantial progress has been made towards over-all compliance with the 'Objectives'.

. . . .

With regard to pollution of the waters of Lake Erie, Lake Ontario and the International section of the St. Lawrence River, the Commission was asked in 1964: 'Are these waters being polluted on either side of the boundary to an extent that is causing or is likely to cause injury to health or property on the other side? If so, in what localities and by what causes, and what remedial measures would be most practicable in the Commission's judgment?' This is an immense assignment, requiring the very best expert assistance that can be brought to bear in both countries. State, Provincial and Federal Officials served together on the International Board which the Commission has established to organize, co-ordinate and direct the necessary technical investigations. Every effort is being made by the Commission to ensure

that the several governments' resources of qualified personnel and technical equipment are used to best advantage. The Commission has made one interim report to the Governments and others may be expected as the study progresses, in order to inform the Governments without delay of the conditions encountered and recommendations for remedial action.

. . . .

Finally, there is the question of air pollution crossing the international boundary affecting citizens and property interests in both countries. Last September the two Governments requested the International Joint Commission to ascertain whether the air in the vicinity of Port Huron, Michigan—Sarnia, Ontario and Detroit, Michigan—Windsor, Ontario is being polluted on either side of the international boundary to an extent that is detrimental to the public health, safety or general welfare of citizens or property on the other side of the boundary. If this question is answered in the affirmative, the Commission is to indicate the sources and extent of air pollution, and to recommend to Governments the most practical preventive or remedial measures."

26. In February of 1969 the Commission publicly released the text of a January 1969 letter to the United States Secretary of State bearing identification as "I.J.C. Docket Number 54-55" and stating that pollution abatement programmes had been instituted by major industries in the area of Sarnia, Ontario, with the result that the Ontario Water Resources Commission was able to report to the International Joint Commission that within the next year or two it was believed that Canadian industries would be in compliance with the "Objectives" of the International Joint Commission.

27. In September of 1969 the International Joint Commission released Volume I of a report to the International Joint Commission by the International Lake Erie Water Pollution Board, and the International Lake Ontario St. Lawrence River Water Pollution Board. This report dealt with the pollution of Lake Erie, Lake Ontario and the International section of the St. Lawrence River.

28. Volume II of the same report dealing specifically in detail with pollution in Lake Erie was released in the spring of 1970. Volume III dealing with Lake Ontario and the International section of the St. Lawrence River has just been released. Volume II represents a study of over 316 pages based on data collected between 1964 and 1967.

29. In April of 1970 the International Joint Commission released its third interim report on pollution of Lake Erie, Lake Ontario, and the International section of the St. Lawrence River.

30. None of these most recent reports of the International Joint Commission makes any significant mention of mercury pollution, awareness of the problem being of very recent origin.

31. Lake Erie has already (September, 1969) been reported to the International Joint Commission by the International Lake Erie Water Pollution Board, as being polluted. Their conclusion was that Lake Erie was "being polluted on both sides of the boundary (United States—Canada) to an extent that it is causing and is likely to cause injury to health and property on the other side of the boundary."—this entirely without regard to any mercury pollution problem.

SUMMARY OF ARGUMENT

1. The "minimum contacts" principle enunciated by the United States Supreme Court measures the maximum extent to which a State may by legislation enable its courts to acquire *in personam* jurisdiction over defendants. This extended jurisdiction is much wider than the common law test of "carrying on business".

The United States Supreme Court, however, has no "long arm" statutory jurisdiction. Thus, the large number of decisions during the past twenty-five years (following the *International Shoe* decision) cannot be relied upon in determining the jurisdiction of the United States Supreme Court. Such decisions are dependent in each case on the existence of special State "long arm" legislation.

Dow Chemical of Canada, Limited's business contacts with the United States of America are so remote that it cannot be said that it is "carrying on business" within the United States of America. This is so even if a liberal interpretation were given to the traditional meaning of "carrying on business".

These remote "contacts" become totally inadequate to support *in personam* jurisdiction when there is no relationship between the "contacts" and the causes of action advanced by plaintiff.

The burden of establishing *in personam* jurisdiction rests upon the State of Ohio.

The total independence of Dow Chemical of Canada, Limited from The Dow Chemical Company prevents this Court from acquiring original jurisdiction over

Dow Chemical of Canada, Limited by virtue only of its personal jurisdiction over the American corporation.

2. The State of Ohio seeks a decree for damages which are not for its own benefit.

The damages claimed are with respect to an alleged injury to property which by Section 123.03 Revised Code of Ohio "belonged to the State as proprietor in trust for the people of the State" and also with respect to an alleged injury to "the citizens and inhabitants of Ohio".

The damages sought are to be held by the State of Ohio in trust for unspecified citizens.

By the Constitution of the United States the original jurisdiction of this Court does not extend to actions in which a State is not a party in its own behalf. Therefore, that portion of the prayer for money damages is not within the original jurisdiction of the Supreme Court of the United States.

3. A Court of Equity would not order injunctive relief in respect of a nuisance which has already been abated at the direction of and subject to continuing regulation by the Crown in right of the Province of Ontario.

Any injunction which this Court could properly frame must not be an idle gesture. It must be one to prevent threatened injury.

4. Extra-territorial injunctive relief may be incapable of enforcement.

It is the duty of this Court to dismiss an original suit in which it cannot make an effective decree. *A fortiori* it is its duty not to entertain such a suit.

5. There is no certain way of removing mercury and mercury compounds from Lake Erie. Proposals advanced to date are speculative both as to efficacy and the consequences that may flow therefrom. The plaintiff's request for a decree requiring the defendants to remove mercury and compounds thereof from Lake Erie and tributaries thereto should not be entertained by this Court because such an order, in the character of a mandatory injunction, would be incapable of being determined with certainty. The alternative of damages in lieu of a mandatory injunction would also be refused by a Court of Equity (and, therefore, this Court) because their assessment would involve the Court in a speculative enquiry and the creation of trusts which themselves would fail for want of certainty.

6. The diverse and competing interests of the several interested sovereign and quasi-sovereign states bordering the Great Lakes drainage system some of whom are beyond the reach of the jurisdiction of this Court require a more comprehensive and political resolution of the problems than can be afforded by a decree of this Court.

There is in existence an International Joint Commission which has demonstrated a continuing, dynamic, active concern with respect to the specific problem to which the Court is being asked to address itself. This same Commission is possessed of facilities, expertise and capacity to produce a workable solution to the problems beyond the facilities, expertise and capacity of this Court.

7. The International Joint Commission set up under the Boundary Waters Treaty of 1909 is charged with the duty to enquire into precisely the same problem to which this Court is asked to address its mind.

Specifically the International Joint Commission has been requested by the two sovereign powers concerned namely the Government of the United States of America and the Government of the Dominion of Canada to make an enquiry into the precise problem, namely pollution of Lake Erie.

The Treaty of 1909 makes adequate provision for the investigation and adjudication of this particular problem.

8. No entity other than the Government of the United States of America or the Government of the Dominion of Canada has a right to enforce the Boundary Waters Treaty of 1909.

A treaty creates obligations solely between the High Contracting Parties and not between one of these parties and the nationals of the other, nor between the nationals of the two High Contracting Parties.

ARGUMENT NUMBER 1

Is There Original Jurisdiction in the Supreme Court of the United States With Respect to an Alien Who Is Not Subject to the In Personam Jurisdiction of the Supreme Court of the United States?

1. The test currently accepted in American Law for determining whether an American Court may assume personal jurisdiction over a foreign corporation is that corporation's "*carrying on business*" within the territorial jurisdiction of the particular American Court. Whether or not a corporation is "*carrying on business*" within a particular jurisdiction is determined by whether there exist adequate "contacts" between the corporation and the particular jurisdiction. This limitation on the jurisdiction of American Courts is founded on "traditional notions of fair play and sub-

stantial justice" inherent in the "due process" requirements of American constitutional law.[1]

2. But it is of paramount importance to recognize that in the leading decisions which enunciated the "contacts" principle the United States Supreme Court was indicating the maximum extent to which the personal jurisdiction of American Courts could be enlarged by *appropriately framed legislation.*

3. The Supreme Court did not purport to say that such extended jurisdiction would exist as a matter of *common law* in the absence of such legislation.[2]

4. Thus in the *Hanson* case Chief Justice Warren was at pains to distinguish the *McGee* case by stating that "there the State had enacted special legislation".[3]

5. The essential distinction between the restricted jurisdiction existing as a matter of common law and the considerably wider jurisdiction under "long arm" statutes enacted expressly for the purpose of broadening the basis for jurisdiction has been most cogently expressed by Breitel J. in *Fremay Inc.* v. *The Modern Plastic Machinery Corp.*[4] who stated that:

> "The *International Shoe* case, and those which have followed in its wake, have merely developed

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[1] *International Shoe Company* v. *State of Washington*, 326 U.S. 310 (1945); *Perkins* v. *Benguet Consolidated Mining Company*, 342 U.S. 437 (1952); *Hanson* v. *Denckla*, 357 U.S. 235 (1958).

[2] *Beaty* v. *M.S. Steel Co.*, 401 F.2d. 157, 161 (4 Cir. 1968), *cert. denied* 89 S.Ct. 686; *Bowman* v. *Curt G. Joa Inc.*, 361 F.2d. 706, 714 (4 Cir. 1966); *Roberts* v. *Evans Case Co.*, 218 F.2d. 893 (7 Cir. 1955); *Pulson* v. *American Rolling Mill*, 170 F.2d. 193, 195 (1 Cir. 1948); *Bomze* v. *Nardis Sportswear Inc.*, 165 F.2d 33 (2 Cir. 1948).

[3] *Hanson* v. *Denckla*, 357 U.S. 235, 252 (1958).

[4] 15 A.D. 2d. 235, 222 N.Y.S. 2d. 694, 698-9 (App. Div.).

> the doctrine that a State may extend the jurisdiction of its courts to encompass actions against a non-resident with respect to matters arising from significant acts of a non-resident in the State . . . . But, unfortunately for plaintiff, there is no statute in this State which extends the jurisdiction of the courts of this State to an action based upon any contract which may have significant contacts within the State. . . . Plaintiff argues that because of the development of . . . the substantial contacts doctrine as laid down in the International Shoe case the extent of "doing business" should be correspondingly broadened. The fallacy is that plaintiff is mixing his categories. . . . 'Moreover, there are policy considerations which suggest that any change should be effected by legislation rather than by judicial decision. In that way, circumstances affecting the convenience of commerce may be more generally considered.' . . . . In short, while it is now clear that under constitutional due process principles the legislature can today broaden the classes of actions in which a foreign corporation may be sued locally, *the New York statutes have not generally been so extended.*" (emphasis added)

6. There is, however, no "long arm" statutory jurisdiction in the United States Supreme Court. The jurisdiction of the United States Supreme Court as expressed both in Article III, Section 2, Clause 2 of the United States Constitution and in Section 1251 of Title 28 of the United States Code is expressed in terms of classes of individuals over whom the Court may in appropriate circumstances assume jurisdiction; it could not have been intended by these provisions to disregard totally the fundamental principles of territorial limitation upon personal jurisdiction.

7. Similarly, within the Rules of the United States Supreme Court there is no rule respecting "personal

jurisdiction" over "alien" corporations. Rule 33(1) of the United States Supreme Court Rules governs service of process. This rule covers service under all circumstances including appeals, is clearly directed to informational rather than jurisdictional questions and could not have been intended to abrogate the time —honoured tests for determining the existence of "personal jurisdiction".

8. Rule 9(2) of the United States Supreme Court Rules provides that in matters of original jurisdiction the Federal Rules of Civil Procedure may apply in appropriate circumstances. Rule 4(f) of the Federal Rules of Civil Procedure provides for service "within the territorial limits of the state in which the district court is held" except as provided elsewhere within the rules or by statute. Service within the Province of Ontario cannot be upheld by any construction of or analogy to this Rule.

9. Nor may process be served pursuant to Rule 4(e) of the Federal Rules of Civil Procedure. That Rule deals with the utilization in Federal Court Proceedings of the "long arm" provisions of "the state in which the district court is held". This last—quoted phrase has no rational meaning in connection with an action within the original jurisdiction of the United States Supreme Court, and hence Rule 4(e) cannot be applied analogously to such an action. Simply stated, the United States Supreme Court is not a "Court ... held within" any particular state. Thus no "long arm" extension of the basic common law rules of personal jurisdiction is applicable in the case at Bar.

10. Congress has not enacted any "long arm" legislation conferring upon the Supreme Court the power

to serve its process outside the territorial boundaries of the United States. Nor does any rule of this Court grant such power.

11. A further distinction it is submitted, ought to be made between those "contacts" which are sufficient to enable an American Court in one state or federal district to obtain personal jurisdiction over a "foreign" corporation incorporated by another American State, and those "contacts" sufficient to enable it to obtain jurisdiction over an "alien" corporation incorporated by a Foreign Sovereign such as the Dominion of Canada.

12. The sales of Dow Chemical of Canada, Limited to American purchasers can be characterized, as involving:

(i) an extremely small proportion of the total sales of Dow Chemical of Canada Limited;

(ii) transactions in which the initiative originated with the American purchaser who was not in any way solicited by representatives of Dow Chemical Company of Canada, Limited;

(iii) offers accepted and hence contracts formed within Canada;

(iv) personal property as to which, under the applicable Canadian law, the title passes in Canada.

13. A "foreign" manufacturer, such as Dow Chemical of Canada, Limited, that fills unsolicited orders received by it from purchasers located within another jurisdiction, by simply shipping goods into that other jurisdiction, without retaining the title to such goods, is not "doing business" within that other jurisdiction, and has an inadequate "contact" with that other jurisdiction to justify the courts of that jurisdiction in as-

suming personal jurisdiction over the "foreign" manufacturer.[5]

14. Where a "foreign" manufacturer, such as Dow Chemical of Canada, Limited, makes a contract of sale by accepting within its own jurisdiction an offer made from outside this jurisdiction, then the contract will be considered as having been made within the jurisdiction in which the manufacturer is located. In such circumstances, either by common law or by statute, the manufacturer will not be considered as having a sufficient "contact" with the jurisdiction of the purchaser to justify the courts of that jurisdiction in taking personal jurisdiction over the manufacturer.[6]

15. Because the sales by Dow Chemical of Canada, Limited to American purchasers constitute merely isolated sales not forming part of a systematic business pattern, they afford an insufficient basis for finding that such business activity could amount to "carrying on business" within the United States.[7] The decisions

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[5] *Beaty* v. *M.S. Steel Co.*, 276 F.Supp. 259, 262-4 (D.Md.) 401 F.2d. 157 (4 Cir. 1968), cert. denied 89 S.Ct. 686; *Tetco Metal Products Inc.* v. *Langham*, 387 F.2d. 721 (5 Cir. 1968); *Lizotte* v. *The Canadian Johns-Manville Company Limited*, 387 F.2d. 607 (1 Cir. 1967); *McKee Electric Company* v. *Rauland-Burg Corporation*, 20 N.Y. 2d. 377, 283 N.Y.S. 2d. 34, 229 N.E. 2d. 604 (Ct. App. 1967); *Kramer* v. *Vogl*, 17 N.Y. 2d. 27, 267 N.Y.S. 2d. 900, 215 N.E. 2d. 159, 161 (Ct. App. 1966).

[6] *Marshall Egg Transport Company* v. *Bender-Goodman Company*, 275 Minn. 534, 148 N.W. 2d. 161; *Litsinger Sign Company* v. *American Sign Company*, 11 Ohio State 2d. 1, 227 N.E. 2d. 609 (Sup. Ct. 1967).

[7] *Hutchinson* v. *Chase and Gilbert*, 45 F.2d. 139 (2 Cir. 1930) (Opinion of Learned Hand, J.); *Chunky Corporation* v. *The Blumenthal Brothers Chocolate Company*, 299 F.Supp. (D.C. N.Y. 1969); *Green* v. *Equitable Power Manufacturing Company*, 99 F.

of this Court in the two cases of *International Shoe Company* and *Perkins* contain emphasis by the Court upon the importance of "continuous and systematic corporate activities" within the jurisdiction of the forum.[8]

16. Where there is no direct relationship between the facts supporting the cause of action and the factual "contact" between the forum and the foreign corporation, the existing "contacts" must be most extensive. The absence of a direct relationship between the cause of action and "the contacts" is a most relevant factor to be taken into consideration by the Court in determining whether jurisdiction exists.[9] Both in the *International Shoe Company* case and the *Perkins* case the United States Supreme Court carefully distinguished between the "contacts" sufficient to justify the assumption of jurisdiction in cases where those "contacts" do not constitute the foundation of the cause of action and cases where they do constitute such

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Supp. 237, 246 (D.C. Ark. 1951); *Buffalo Belt and Felt Corporation* v. *Royal Manufacturing Company*, 27 F.2d. 400, 402 (D.C. N.Y. 1928); *Duke* v. *The Pioneer Mining and Ditch Company*, 280 F. 883 (D.C. Wash. 1922); *Muraco* v. *Ferentino*, 247 N.Y.S. 2d. 598, 602 (Sup. Ct. 1964). *See also: Velandra* v. *Regie Nationale Des Usines Renault*, 336 F.2d. 292, 297-8 (6 Cir. 1964) for emphasis on number, value and percentage of sales within the forum state.

[8] *International Shoe Company* v. *The State of Washington*, 326 U.S. 310, 318 (1945); *Perkins* v. *Benguet Consolidated Mining Company*, 342 U.S. 437, 445 (1952).

[9] *Fisher Governor Company* v. *The Superior Court of San Francisco*, 53 Cal. 2d. 222, 347 P.2d. 1, 1 Cal. Rptr. 1 (Sup. Ct. in Bank 1959); *Colorado Builders Supply Company* v. *Hinman Bros. Construction Company*, 304 P. 2d. 892, 896 (Colo. Sup. Ct. in Bank 1956); *Conn.* v. *I.T.T. Aetna Finance Company*, 252 A.2d. 184, 189-90 (R.I. Sup. Ct. 1969).

foundation.[10] In the case at bar, the less than minimal business "contacts" between Dow Chemical of Canada, Limited and the United States involve isolated sales transactions totally unrelated to the nuisance alleged by the Plaintiff.

17. Numerous cases, particularly cases in which a cause of action is based on the negligent manufacture of products outside the forum state by a manufacturer who carries on a sales activity to some extent within the forum state have stressed the importance of this relational factor.[11]

18. The plaintiff asserting the existence of jurisdiction in the forum state on the basis that the Defendant is carrying on business therein, or on the basis that the Defendant has adequate "contacts" therewith has the burden of proving the existence of the requisite jurisdictional facts.[12]

19. By way of an analogy, this Court has held that the burden of proving the existence of a sufficient

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[10] *International Shoe Company* v. *The State of Washington*, 326 U.S. 310, 318 (1945); *Perkins* v. *Benguet Consolidated Mining Company*, 342 U.S. 437, 444 (1952).

[11] *Eyerly Aircraft Company* v. *Killian*, 414 F.2d. 591, 597 (5 Cir. 1969); *Deveny* v. *Rheem Manufacturing Company Limited*, 319 F.2d. 124, 127 (2 Cir. 1963); *Blount* v. *Peerless Chemicals (P.R.) Inc.*, 316 F.2d 695, 700 (2 Cir. 1963); *B.K. Sweeney Company* v. *The Colorado Interstate Gas Company*, 429 P.2d. 759, 762 (Okla. Sup. Ct. 1967).

[12] *Lizotte* v. *The Canadian Johns-Manville Company Ltd.*, 387 F.2d. 607 (1 Cir. 1967); *Smeltzer* v. *Deere and Company*, 252 F.Supp. 552, 555 (W.D. Pa. 1966); *Detsch and Company* v. *Calbar Incorporated*, 228 Cal.App.2d. 556, 39 Cal. Rptr. 626, 632 (Dist. Ct. App. 1964); *Young Spring and Wire Corporation* v. *Smith*, 176 So.2d. 903, 905 (Fla. Sup. Ct. 1965).

monetary sum in controversy to justify the assumption of jurisdiction is upon the party asserting the existence of such jurisdiction.[13]

20. Service of process upon The Dow Chemical Company would not be service of process upon Dow Chemical of Canada, Limited.[14]

ARGUMENT NUMBER 2

Can the Original Jurisdiction of the Supreme Court of the United States be Invoked by the Plaintiff With Respect To That Portion of the Prayer for Relief Relating to a Money Decree for Damages?

1. Dow Chemical of Canada, Limited submits this Court lacks original jurisdiction under the Constitution of the United States with respect to that portion of the prayer for relief being asserted by the State of Ohio in its capacity as Trustee for the citizens and inhabitants of Ohio because the State in its own behalf apart from its capacity as Trustee is not a party to these claims as is required by Article III Section 2, Clause 2 of the Constitution of the United States.

2. The claims sought to be asserted in paragraphs 3 and 4 of plaintiff's prayer for relief are, in the case of paragraph 3, capable of being advanced by the State of Ohio only in its capacity as Trustee for the citizens

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[13] *K.V.O.S. Incorporated* v. *The Associated Press*, 299 U.S. 269, 280 (1936).

[14] *A.G. Bliss Co.* v. *United Carr Fastener Company of Canada*, 116 F.Supp. 291 (D. Mass. 1953), *affirmed* 213 F.2d. 541 (1 Cir. 1954); *Blount* v. *Peerless Chemicals (P.R.) Inc.*, 316 F.2d. 695, 699 (2 Cir. 1963); *Compania Mexicana Refinadora Island* v. *Compania Metropolitana de Oleoductos S.A. et al.*, 250 N.Y. 20, 164 N.E. 907, 909 (Ct. App. 1928); see by way of analogy *Cannon Manufacturing Company* v. *Cudahy Packing Company*, 267 U.S. 333, 336, 337 (1925).

and inhabitants of Ohio, and in the case of paragraph 4, are admittedly advanced by the State of Ohio in its capacity as Trustee.

3. It has been stated by this Court that, in order to bring a case within its original jurisdiction, it is not enough that a state is nominally plaintiff when, in reality, the relief sought is on behalf of or for the benefit of particular individuals.[1]

4. A damage action brought by a state as Trustee on behalf of its citizens is quite distinct from a *parens patriae* action. As was stated by this Court in *North Dakota* v. *Minnesota:*[2]

> "The right of a state as *parens patriae* to bring suit to protect the general comfort, health or property rights of its inhabitants threatened by the proposed or continued action of another state, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their Trustee against a sister State."

5. In that case North Dakota in addition to an injunction sought a decree against Minnesota for damages for itself and for its inhabitants whose farms were injured and whose crops were lost.

6. The Eleventh Amendment to the Constitution forbidding the extension of the judicial power of the United States to any suit in law or equity prosecuted against any one of the United States by citizens of

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[1] *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387, 394, 396; *Hawaii* v. *Standard Oil Company of California*, 301 F.Supp. 982 (D. Hawaii 1969); *The Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corporation*, 309 F. Supp. 1057 (E.D. Pa. 1969).

[2] 263 U.S. 365, 375.

another state, or by citizens and subjects of a foreign state was invoked to deny jurisdiction.

7. The reasoning of the Court was that, notwithstanding the naming of the State as plaintiff, the State was maintaining the action as Trustee for its citizens and the Amendment to the Constitution prevented the Court from accepting original jurisdiction with respect to the prayer for a money decree for the damage done to the farms of individuals on whose behalf the State was suing as Trustee.

8. A suit in the name of a State for the benefit of other parties really interested is, for jurisdictional purposes, regarded as a suit by the person for whose benefit it is brought.[3]

9. In *Oklahoma* v. *Atchison etc. Railway Company*[4] this Court stated:

> "These doctrines, we think, control this case and require its dismissal as not being within the original jurisdiction of this court as defined by the Constitution. Under a contrary view that jurisdiction could be invoked by a State, bringing an original suit in this court against foreign corporations and citizens of other States, whenever an original suit in this court against foreign corporations and citizens of other States, whenever the State thought such corporations and citizens of other States were acting in violation of its laws to the injury of its people generally or in the aggregate; although, an injury, in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of States could be reached, without the intervention of the State, by suits instituted by the

[3] *Georgia* v. *Pennsylvania Railway Co.*, 324 U.S. 439, 446; *Arkansas* v. *Texas*, 346 U.S. 368, 371.

[4] 220 U.S. 277, 289.

persons directly or immediately injured. We are of the opinion that the words in the Constitution, conferring original jurisdiction on this Court, in a suit 'in which a State shall be a party', are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers generally".

10. While it is clear under the Constitution that the Court has jurisdiction to entertain a *parens patriae* action by a State for an injunction to protect its quasi sovereign rights, it should be noted that these *parens patriae* rights are rights possessed by the State separate and distinct from the rights which the individual citizens of the State possess. This *parens patriae* right is analogous to but not the same as the individual's right under the law of torts.[5] There is no precedent in this Court for the recovery of monetary damages in a *parens patriae* suit.[6]

11. In this case where the State of Ohio is suing as Trustee to recover damages on behalf of its citizens it asserts the rights of its citizens, under the law of torts, the measure of damages being those damages suffered by the citizens, and it is only a nominal party to the action. The case in that respect is not one in which the state is a party because there is no right of the state *per se* being asserted. Hence, there is no original jurisdiction in the Supreme Court of the United States with respect to that portion of the prayer.

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[5] *Georgia* v. *Tennessee Copper Company*, 206 U.S. 230, 237.

[6] *Hawaii* v. *Standard Oil Company of California*, 301 F. Supp. 982 (D. Hawaii 1969).

ARGUMENT NUMBER 3

Will the Supreme Court of the United States Assume Jurisdiction in an Action Founded on an Alleged Nuisance Where the Alleged Nuisance Was Abated Prior to the Institution of the Action?

1. Dow Chemical of Canada, Limited has complied with the Ministerial Order of the Crown in right of the Province of Ontario prohibiting the discharge of mercury and mercury compounds from its plant into the St. Clair River.[1]

2. Any nuisance there may have been has been abated, and remains subject to the continuing jurisdiction of the Crown in right of the Province of Ontario. Injunctive relief is no longer necessary, indeed, the trial of such an issue would be a mere academic exercise.

3. A court will not order injunctive relief for the abatement of a nuisance when the activities constituting the nuisance have already been discontinued without judicial intervention.[2]

4. Particularly is this so where there is an independent assurance, in the form of the order of a regulatory Commission, (in this instance a Crown agency,

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[1] See Appendix VII. and Appendix VI.

[2] *City of Elizabeth* v. *Gilchrist*, 86 A. 535 (N.J. Ch. 1912); *Miller* v. *Edison Electric Illuminating Co.*, 66 A.D. 470, 73 N.Y.S. 376 (App. Div. 1901); *Chamberlain* v. *Ciaffoni*, 96 A. 2d. 140 (Pa. Sup. Ct. 1953); *Akers* v. *Mathieson Alkali Works*, 144 S.E. 492, 494 (Va. Sup. Ct. App. 1928); For the principle as related to injunctions outside the "nuisance" context, see: *Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953).

the Ontario Water Resources Commission) against the resumption of the discontinued activities.[3]

5. Specifically, in the case of *Dutton* v. *Rocky Mountain Phosphate Incorporated*,[4] the Supreme Court of Montana refused to totally enjoin the defendant from engaging in activities constituting air pollution because the defendant had already installed equipment to reduce the emission of flouride to levels consistent with the emission standards underlying a conditional State Board of Health order for closure of the plant. In the case at bar, Dow Chemical of Canada, Limited has altered its industrial practices to comply with the order of the Ontario Water Resources Commission prohibiting the discharge or introduction of mercury and mercury compounds into the St. Clair River.

6. "It is the duty of this Court to dismiss an original suit in which it cannot make an effective decree. *A fortiori,* it is its duty not to entertain such a suit."[5]

7. "Any injunction which this Court could properly frame must not be an idle gesture. It must be one to prevent the threatened injury."[6]

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[3] *Cf. Independent News Co.* v. *Williams*, 404 F.2d. 758, 761 (3 Cir. 1968).

[4] 450 P. 2d. 672, 677 (Mon. Sup. Ct. 1969).

[5] *Georgia* v. *Pennsylvania Railway Co.*, 324 U.S. 439, 487 (1945).

[6] Ibid.

ARGUMENT NUMBER 4

Will the Supreme Court of the United States Assume Jurisdiction in a Matter Where There May Exist Doubt as to Its Ability To Enforce Its Judgment?

1. In this case there is a prayer for extra-territorial injunctive relief. Dow Chemical of Canada, Limited is not within the territorial limits of the United States of America nor does it have sufficient contacts with the United States of America to enable the Supreme Court of the United States to possess any degree of certainty as to its ability to enforce its own order.

2. Should this Court deem it proper to consider injunctive relief against Dow Chemical of Canada, Limited because of an apprehension of a resumption of activities amounting to a nuisance, the Supreme Court ought to adhere to the well established legal principle that no Court will make an order which it does not have the ability to enforce because such an order tends to bring the orders of the Court into disrepute.[1]

3. The Supreme Court of the United States would not, in fact, have power to enforce an order requiring a Canadian corporation to take or desist from a particular course of action carried on within the boundaries of Canada. In the converse situation of an action brought before the Courts of Ontario to enjoin activities amounting to a nuisance and carried on within one of the United States of America by a resident thereof, a Canadian Court would not provide injunctive relief

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[1] *State ex rel. Watkins* v. *North American Land & Timber Co. Limited*, 31 S. 172, 176-177 (La. Sup. Ct. 1902); see 32 C.J. 75 and 43 C.J.S. 459.

to the plaintiff by reason of the inability of the Canadian Court to enforce its order.[2]

4. It is possible for a successful litigant to bring an action in the Courts of Ontario seeking by way of relief the enforcement of the judgment of the Court of the foreign jurisdiction.[3]

5. A Court of the British Commonwealth, however, will not enforce a foreign injunctive decree.[4]

6. The Courts of Ontario will not enforce "long arm" jurisdiction even if they would themselves have similar statutory jurisdiction in a comparable factual situation.[5]

7. The leading case setting out the common law rules for the recognition of foreign judgments by the Ontario Courts is *Emmanuel* v. *Symon*:[6]

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[2] *Attorney General* v. *The Niagara Falls International Bridge Co.* (1873), 20 Grant's Ch. 490, 514-16. *See also Marshall* v. *Marshall* (1888), 38 Ch. D. 330 (C.A.); *Kinahan* v. *Kinahan* (1890), 45 Ch. D. 78.

[3] See 8 Canadian Encyclopedic Digest (2nd. ed.) 383-4.

[4] *See:* Dicey & Morris, THE CONFLICT OF LAWS, 1017-19 (8th ed. 1967) where it is stated at 1019: "If, however, the judge [of a foreign court] orders [the defendant] to do anything [other than pay money], e.g. specifically perform a contract, it will not support an [enforcement] action [in the forum] though it may be *res judicata.*" *See also:* Wolff, PRIVATE INTERNATIONAL LAW, Section 243 (2nd. ed. 1950) *and see Gauthier* v. *Routh* (1843), 6 UCQB (O.S.) 602, 607.

[5] *Re Trepca Mines Ltd.* [1960], 1 W.L.R. 1273, 1281; *Societe Cooperative Sidmetal* v. *Titan International Ltd.* [1966], 1 Q.B. 828; *Sharpes Commercials Ltd.* v. *Gas Turbines Ltd.* [1965], N.Z.L.R. 819; *Bainford et al.* v. *Newell-Roberts* [1962], I.R. 95.

[6] [1908] 1 K.B. 302, 309 (C.A.).

"In actions *in personam* there are five cases in which the courts of the country will enforce a foreign judgment:

(1) where the defendant is a subject of the foreign country in which the judgment has been obtained;

(2) where he was resident in the foreign country when the action began;

(3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued;

(4) where he has voluntarily appeared; and

(5) where he has contracted to submit to the forum in which the judgment was obtained."

8. It is a principle of United States Law that a Court will not grant an injunction where the defendant is beyond the jurisdiction and the act sought to be enjoined or done is an act performed or to be performed outside the jurisdiction of the Court of whom the relief is requested.[7]

9. It is submitted that in addition to the International Joint Commission, a proper forum for seeking injunctive relief is the Supreme Court of Ontario to which jurisdiction Dow Chemical of Canada, Limited is subject.

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[7] *Mississippi & Missouri Railroad Company* v. *Ward*, 2 Black (67 U.S.) 485, 492-494 (1862); *McGowan et al.* v. *Columbia River Packers Association et al.*, 219 F. 365, 373-377 (9 Cir. 1914), *affirmed* 245 U.S. 352, 357-358 (1917); *Gilbert* v. *The Moline Water Power and Manufacturing Company*, 19 Iowa 319 (1866); *Gunter* v. *Arlington Mills*, 171 N.E. 486 (Mass. Sup. Jud. Ct. 1930); *Western Union Telegraph Co.* v. *Pacific and A. Telegraph Co.*, 49 Ill. 90 (1868); *Gaines* v. *Farmer*, 55 Tex. Civ. A. 601, 119 S.W. 874, 878 (1909); *Royal Fraternal Union* v. *Lundy*, 51 Tex. Civ. A. 637, 113 S.W. 185, 187 (1908).

ARGUMENT NUMBER 5

Will the Supreme Court of the United States Assume Jurisdiction Where the Relief Requested Is Incapable of Enforcement by Reason of Its Lacking in Certainty and by Reason of the Trust Sought to be Created Being Lacking in Certainty?

1. A decree in the character of a mandatory injunction requiring anyone to remove mercury and mercury compounds from Lake Erie presumes the existence of a means of doing so which has hitherto been unknown to science.

2. This impliedly has been conceded by the State of Ohio in its request for damages as an alternative relief. In their brief the inclusion of the phrase "If found to be feasible" constitutes a candid acknowledgement of ignorance on the part of the State of Ohio as to the existence of any method of accomplishment.

3. It is submitted that this Court ought not to grant a mandatory injunction without clear proof that it is possible or "feasible" to comply with the Court's order. A defendant ought not to be required to do an impossible or an impracticable thing.

4. It further presupposes that failing the existence of a feasible method, the Court will order the creation of a trust which offends the rules respecting certainty and must, therefore, fail as a matter of law.

5. The trust specified in the complaint of the State of Ohio would be void because:

(a) it is uncertain as to the event or time of vesting;

(b) it is uncertain as to the class of beneficiaries; (here the State of Ohio would appear to wish to be Trustee for all persons interested in Lake

Erie and would include the State of Ohio, Michigan, Pennsylvania, New York, the United States of America, the Province of Ontario and the Dominion of Canada, and all the inhabitants and citizens of these sovereign and quasi-sovereign states present and future)

(c) it is uncertain as to whether or not it will ever vest in anyone.

ARGUMENT NUMBER 6

Does the 1909 (Boundary Waters) Treaty Provide the Mechanism for Investigating and If Necessary Adjudicating Upon Controversies Involving the Great Lakes?

1. Article IX of the Treaty contemplates the production of a report by the Commission which is expressly characterized as not amounting to a decision or arbitral award. By way of contrast Article X of the 1909 Treaty provides for a binding decision either by the Commission in the case of a majority opinion, or, in cases where the Commission is unable to produce a majority decision, by an umpire selected in accordance with the 1907 Hague Convention for the pacific settlements of international disputes.

2. Article X which provides for the settlement of matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada, either in relation to each other or to their respective inhabitants, is to be invoked "by the consent of the two parties". This is in contrast to Article IX which may be invoked by either of the Sovereign States independent of each other.

3. Article XII of the Treaty provides for the rendering of technical assistance to the Commission as

well as for the empowering of the Commission to administer oaths and take evidence on oath.

4. The International Joint Commission has, by virtue of the 1909 Treaty, been invested with adequate power to deal with all matters respecting pollution of the Great Lakes, and in such a case the judicial system ought to defer to the administrative quasi-judicial apparatus specifically created for dealing with the particular controversy.[1]

5. Especially is this so where any adjudication on the manner or feasibility of removing mercury or mercury compounds from Lake Erie must necessarily affect the health and welfare of all persons adjacent or downstream from any such removal attempt. (e.g. dredging.) In particular the Governments of Canada and the Province of Ontario and the citizens thereof are persons necessarily affected by any order this Court

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[1] *Z. F. Assets Realization Corporation* v. *Hull*, 31 F. Supp. 371, *affirmed* 114 F.2d. 464, *certiorari granted* 311 U.S. 632, affirmed 311 U.S. 470; *GMO Nichaus & Co.* v. *The United States*, 373 F.2d. 944, 957 (Ct. Cl.); *Hannevig* v. *The United States*, 84 F. Supp. 743 (Ct. Cl. 1949); *see also* the reference to the Supreme Court's exhaustion of remedies principle in The Original Jurisdiction of the United States Supreme Court, 11 STANFORD LAW REVIEW 665, 687, footnote 145: "In suits between states, as in normal equity practice, before leave to file will be granted, or even considered, the complaining state must show the application has been made to the defendant state for correction of the grievance. Consequently, it is the practice of litigant states to allege that they have exhausted all extralegal remedies before bringing suit. See Motion for Leave To File a Complaint, p. 32, *California* v. *Washington*, 358 U.S. 64 (1958). The requirement is satisfied either by these unsuccessful efforts, cf. *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 236 (1907) (dictum), or continued authorization by the state legislature of the acts complained of. *New York* v. *New Jersey*, 256 U.S. 296 (1921); *Louisiana* v. *Texas*, 176 U.S. 1, 22-23 (1900). See also *Missouri* v. *Illinois*, 180 U.S. 208, 210 (1901)."

may make requiring such removal. They are accordingly indispensable parties to this suit while at the same time they are beyond the reach of the jurisdiction of this Court.[2] Where essential parties to a suit are absent and beyond the reach of the jurisdiction of this Court, this Court ought not to assume jurisdiction.[3]

6. For over half a century the International Joint Commission has proved to be a dynamic and invaluable mechanism for investigating problems concerning pollution of the Great Lakes and has consequently been utilized by the American and Canadian Governments as the primary and appropriate institution for dealing with Great Lakes pollution problems.

7. The International Joint Commission has proved ittself an effective adjudicative body when directed to deal with damage claims arising out of pollution matters with international ramifications.[4]

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[2] *Oster* v. *Dominion of Canada*, 144 F. Supp. 746 (N.D. N.Y. 1956) *affirmed* 238 F.2d 400 (2 Cir. 1956) *cert. denied* 353 U.S. 936 (1957).

[3] *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 235-238, 245-7 (1902); *Arizona* v. *California*, 298 U.S. 558, 571-2 (1936).

[4] Decision of the Trail Smelter Arbitral Tribunal, 35 Am. J. Int'l Law 684 (1941), discussed in (1963) 1 Canadian Year Book of International Law 213.

ARGUMENT NUMBER 7

Should the Supreme Court of the United States Assume Jurisdiction in a Case Involving Delicate International Questions of Political Sensitivity and Complex Questions of Fact Where the Two Sovereign Governments Concerned Have Established and Empowered a Specialized Agency (The International Joint Commission)?

1. Dow Chemical of Canada, Limited has complied with the Ministerial Order of the Crown in right of the Province of Ontario prohibiting the discharge of mercury and mercury compounds from its plant into the St. Clair River.[1]

2. Thus, any nuisance has been abated with the result that the injunctive relief requested by the plaintiff is unecessary. There remains outstanding the claim for damages as Trustee together with the claim for a mandatory decree with an alternative claim for damages in lieu thereof.

3. It is submitted that the disposition of these latter claims is one which properly lies within the jurisdiction of the International Joint Commission.

4. It is submitted that this is so simply because they alone are in a position to represent and weigh the combined and the sometimes competing interests of the several interested soverign and quasi-sovereign states.

5. It is not only those states which border on Lake Erie that are affected. The entire Great Lakes drainage basin may well be the subject of the total concern.

6. The International Joint Commission alone is in a position to marshal the very considerable amount of

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[1] See Appendix VII. and Appendix VI.

technical assistance necessary to assess and evaluate the following very complex issues of fact and law:

(i) What are the sources of mercury contamination in the Great Lakes and what is their nature and character? To resolve this problem, an enquiry must be made into:

(a) a consideration of water flows and drainage basins and pollution generally in Lake Superior, Lake Michigan and Lake Huron, as well as Lake St. Clair, the St. Clair River and the Detroit River and Lake Erie;

(b) a consideration of other sources of mercury, both natural and pollutive on both sides of the international boundary between the United States and Canada.

(ii) What valid concern is there with respect to mercury pollution? To resolve this problem an enquiry must be made into:

(a) a conisderation of the multi-varied microorganisms as might possess the capacity to convert metallic mercury into methyl mercury and their presence in the Great Lakes drainage basin;

(b) a consideration of the flow patterns that might conduct the contaminated material from one area of one of the Great Lakes to another;

(c) a consideration of the ecological factors affecting various species of fish;

(d) a consideration of the toxicological aspects of mercury and its compounds

and in particular its effect on human beings following their consumption of fish known to have ingested by some metabolic process mercury in one of its various forms;

(e) a consideration of the weight to be attached to mercury pollution in the overall context of an already polluted Lake Erie.

(iii) What immediate measures should be taken to resolve this problem? To resolve this problem an enquiry must be undertaken into:

(a) a consideration of the consequences that may flow directly or indirectly from any and all alternative procedures with particular reference to the rights of the citizens and inhabitants of those Provinces and States situated down stream along the shores of the Niagara River, Lake Ontario and the St. Lawrence River;

(b) a consideration of the overall co-ordination and integration of such remedial steps with those steps already underway to resolve the existing problems of pollution in Lake Erie;

(c) a consideration of and an apportionment of the costs of such a program as part of a larger program to eliminate pollution generally in Lake Erie and an apportionment of these costs in terms of the extent to which any one person may be found to have caused or contributed to the problems of pollution generally.

7. "As Mr. Justice Holmes put it:

> 'Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.' *Missouri* v. *Illinois, supra,* 200 U.S. at 521. Indeed, so awkward and unsatisfactory is the available litigious solution for these problems that this Court deemed it appropriate to emphasize the practical constitutional alternative provided by the Compact Clause. Experience led us to suggest that a problem such as that involved here is 'more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.' *New York* v. *New Jersey,* supra, at 313."[2]

8. "A mandatory injunction should never be granted when its enforcement will require too great an amount of supervision by the court. It needs no citation of authorities to sustain this proposition. It is a fundamental principle and of general application in this and other jurisdictions."[3]

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[2] *Dyer* v. *Simms,* 341 U.S. 22, 27 (1951).

[3] *McCabe et al.* v. *Watt et al.,* 73 A. 453, 455 (Pa. Sup. Ct. 1909); *Johnson* v. *Lancaster,* 266 S.W. 565, 569 (Tex. Civ. App. 1924); *Cameron et al.* v. *City of Carbondale,* 76 A. 198, 199 (Pa. Sup. Ct. 1910).

ARGUMENT NUMBER 8

Does Anyone Other Than the Government of the United States of America Have a Right To Enforce the Boundary Waters Treaty of 1909?

1. The proposed complaint of the plaintiff alleges a violation of the 1909 (Boundary Waters) Treaty by Dow Chemical of Canada, Limited.

2. Only the Government of the United States of America as one of the High Contracting Parties under the 1909 (Boundary Waters) Treaty would be entitled as a matter of *International Law* to enforce obligations created by the Treaty. The State of Ohio would have no such right. The applicable principle is put tersely in the leading English language text on the subject, Lord McNair's *The Law of Treaties.*[1]

> "A treaty creates obligations between the contracting parties solely, that is, the contracting states (or more popularly, their Governments), and not between one party and the nationals of another, or between the nationals of two or more parties".

Similarly, Clive Parry comments:[2]

> "It is . . . . useless to attempt to specify what precise rights a treaty may confer and what obligations they impose. But these must be rights or obligations of an international person in international law".

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[1] 2nd. ed., 1961, at 322.

[2] *The Law of Treaties,* ch. 4 of MANUAL OF PUBLIC INTERNATIONAL LAW 220 (M. Sorensen ed., 1968).

CONCLUSION

Because:

(i) The Supreme Court of the United States does not possess *in personam* jurisdiction over Dow Chemical of Canada, Limited;

(ii) The State of Ohio is not a "party" other than in its capacity as Trustee for its citizens with respect to its claims for damages;

(iii) The Supreme Court of the United States ought not to assume original jurisdiction in an action on an alleged nuisance where the nuisance has already been abated;

(iv) The Supreme Court of the United States ought not to assume original jurisdiction where there exists doubt as to its ability to enforce its judgment;

(v) The Supreme Court of the United States ought not to assume original jurisdiction where the relief:

  (a) is incapable of enforcement because it is lacking in certainty; or

  (b) requires the Court to embark upon speculative assessments and the creation of Trusts which are themselves incapable of certainty;

(vi) The 1909 (Boundary Waters) Treaty provides the mechanism for investigating and adjudicating upon the controversies involving pollution of the Great Lakes and in particular of Lake Erie;

(vii) The Supreme Court of the United States ought not to assume original jurisdiction where there exists a specialized agency such as the International Joint Commission;

(viii) Only the United States of America has the right in International Law to enforce the Treaty of 1909;

it is respectfully submitted that the application by the State of Ohio for leave to file a complaint ought to be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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